Public Prosecutor v Hasniah Badulu

HIGH COURT (TAWAU) — CRIMINAL CASE NO TWU-45A–6/8 OF 2020
LIM HOCK LENG J
12 JULY 2022

Criminal Law — Dangerous drugs — Trafficking — Accused charged with trafficking 312.98g of methamphetamine — — Whether prosecution succeeded in establishing prima facie case against accused — Whether accused in actual possession of drugs — Whether drugs found in pants worn by accused or in the accused's bag — Whether prosecution's case proven beyond reasonable doubt — Whether defence of innocent carrier proven — Whether there was wilful blindness — Whether defence bare denial and afterthought

Whilst PW3, a member of the auxiliary police force, was on duty at the Ferry Terminal Tawau, she noticed that the accused was in a state of anxiety. PW3, therefore carried out a body search on the accused and discovered two black plastic packages, in the front pocket of the accused's brown pants (P10). There were further five black plastic packets in each of these two black plastic packages. Each package contained white crystalline substances suspected to be methamphetamine. The accused was then arrested and charged under s 39B(1)(a) of the Dangerous Drugs Act 1952. The main thrust of the defence was that: (a) the drugs were found in the accused's bag and not in the front pocket of the brown pants she was wearing when searched; and (b) she was an innocent carrier as the accused thought the packages contained medication for asthma that a family member by the name of Nanang in Lahad Datu had asked her to bring medication for Nanang's family in Indonesia.

Held, convicting and sentencing accused to life imprisonment:

(1) The contention of the defence that it was physical impossibility for the drugs to fit the front pocket or, alternatively, if they could be forcibly inserted into PW10 of the accused were mere suggestions since there was no evidence of "the measurements, the physics and dimensions of the items involved." In consequence, no reasonable doubt was cast on PW3's testimony as to where the drugs were found. Even from a visual examination of P10 and the packages, aided by the accused's testimony that the packages were the size of her clenched fist, it could be seen that they would fit into the front pocket of P10. In fact, it was more of a pouch. Further, the accused acknowledged that the pocket was not originally part of P10 but was subsequently added. It seemed unlikely

that the pocket was stitched on 'sebab selalu banyak pencuri di atas kapal' because she was worried her money - which was the only item in the pocket — could be stolen. That worry was inconsistent with her earlier testimony that she put her money in her bag. Therefore, the pocket was added to accommodate the drugs, more so as outer garments were worn over the brown pants, thus providing total concealment (see paras 71–73).

(2) Although the accused contended that the drugs were found in a bag which was not produced a trial — where adverse inference ought to be drawn pursuant to s 114(g) of the Evidence Act — the lack of motive for PW3 to frame the accused and lack of nexus between the drugs and item — where it is not a requirement for the item to be seized under s 64 of the Criminal Procedure Code is sufficiently compelling to make out the prosecution's case of 'actual possession' (paras 37–40 & 43–45).

(3) As for the defence of innocent carrier, the court was of the view that Nanang did not exist. Apart from describing Nanang as 'gemuk-gemuk dan pendek' and that she resides in Kampung Bugis in Lahad Datu, the accused did not provide any material particulars of Nanang. It was incredulous that the accused would agree to make the journey from Indonesia to Tawau and thence Lahad Datu solely to collect medication to be delivered to Nanang's grandmother and her uncle, especially since the accused was an illiterate housewife. There was, inter alia: (a) no good reason given why Nanang could not deliver the medication herself; and (b) no credible evidence that the same medication for asthma or for the heart, high blood pressure and cholesterol was not available in Indonesia. Even if Nanang existed, the defence of innocent carrier could only avail the accused if there was no reason for suspicion, no right and opportunity of examination, and ignorance simpliciter was insufficient (see paras 83–84 & 86–88).

(4) The accused had the opportunity to open the packages to look at the contents while on the bus from Lahad Datu to Tawau, a journey which takes about 150 minutes. The accused was wilfully blind to the contents and the defence of innocent carrier did not avail her (see paras 90–91).

(5) The prosecution had proven its case against the accused beyond reasonable doubt in respect of all the essential elements of the charge. The accused had custody or control of 312.98g of methamphetamine with the requisite knowledge (actual possession) on the date and at the time and place stated in the charge. The accused failed to rebut the statutory presumption of trafficking on a balance of probabilities, and to raise a reasonable doubt in the prosecution's case. Therefore, the accused was convicted of the offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The court sentenced the accused, who was 68 years of age at the time of sentencing, to life imprisonment from the date of her arrest. The

accused was, however, spared the punishment of whipping on account of s 289 of the Criminal Procedure Code (see paras 93–95).

[Bahasa Malaysia summary

Ketika PW3, anggota pasukan polis bantuan, bertugas di Terminal Feri Tawau, dia menyedari tertuduh berada dalam keadaan cemas. Sehubungan itu, PW3 menjalankan pemeriksaan badan ke atas tertuduh dan menemui dua bungkusan plastik berwarna hitam, di dalam poket hadapan seluar coklat milik tertuduh (P10). Terdapat lagi lima paket plastik hitam dalam setiap dua bungkusan plastik hitam ini. Setiap bungkusan mengandungi bahan kristal putih disyaki dadah jenis methamphetamine. Tertuduh kemudian ditahan dan dituduh dibawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Alasan utama pembelaan ialah: (a) dadah ditemui di dalam beg tertuduh dan bukannya di poket depan seluar coklat yang dipakainya ketika pemeriksaan; dan (b) dia adalah pembawa yang tidak bersalah kerana tertuduh menyangka bungkusan itu mengandungi ubat untuk asma yang mana ahli keluarganya dengan nama Nanang di Lahad Datu telah memintanya membawa ubat untuk keluarga Nanang di Indonesia.

Diputuskan, mensabitkan dan menjatuhkan hukuman penjara seumur hidup kepada tertuduh:

(1) Hujahan pembelaan bahawa dadah itu adalah tidak mustahil untuk muat di poket depan atau, sebagai alternatif, ianya mungkin dimasukkan secara paksa ke dalam eksh PW10 milik tertuduh hanyalah cadangan kerana tiada bukti 'ukuran, fizik dan dimensi item yang terlibat'. Akibatnya, tiada keraguan munasabah di dalam pada keterangan PW3 tentang di mana dadah itu ditemui. Walaupun daripada pemeriksaan visual P10 dan bungkusan itu, dibantu keterangan tertuduh bahawa bungkusan itu adalah saiz penumbuknya, dapat dilihat bahawa ianya muat di dalam poket depan P10. Malah, ianya lebih berbentuk kantung. Selanjutnya, tertuduh mengakui bahawa poket itu pada asalnya bukan sebahagian daripada eksh P10 tetapi kemudiannya ditambah. Juga, tidak mungkin poket itu dijahit 'sebab selalu banyak pencuri di atas kapal' kerana dia bimbang mengenai wangnya — yang merupakan satu-satunya barang di dalam poket — yang boleh dicuri. Kebimbangan itu tidak konsisten dengan keterangannya sebelum ini bahawa dia memasukkan wangnya ke dalam begnya. Oleh itu, poket itu ditambah untuk memasukkan dadah itu, lebih-lebih lagi apabila pakaian luar yang dipakai di atas seluar coklat itu bertujuan untuk menyembunyikan dadah itu secara keseluruhan (lihat perenggan 71–73).

(2) Walaupun tertuduh berhujah bahawa dadah itu ditemui dalam beg yang tidak dikemukakan ketika perbicaraan — di mana inferens buruk harus dibuat menurut s 114(g) Akta Keterangan — kekurangan motif untuk PW3 untuk mengenakan tertuduh dan kekurangan hubungan antara

dadah dan barang — di mana ianya bukan keperluan untuk barang itu dirampas di bawah s 64 Kanun Tatacara Jenayah — adalah mencukupi untuk membuktikan 'pemilikan sebenar' di dalam kes pendakwaan (perenggan 37–40 & 43–45)

(3) Bagi pembelaan pembawa yang tidak bersalah ('innocent carrier'), mahkamah mendapati orang yang Bernama Nanang tidak wujud. Selain menyifatkan Nanang sebagai 'gemuk-gemuk dan pendek' dan dia tinggal di Kampung Bugis, Lahad Datu, tertuduh tidak memberikan sebarang butir penting mengenai Nanang tersebut. Adalah tidak masuk akal untuk tertuduh bersetuju untuk membuat perjalanan dari Indonesia ke Tawau dan Lahad Datu semata-mata untuk mengambil ubat-ubatan untuk dihantar kepada nenek Nanang dan bapa saudaranya, terutamanya kerana tertuduh merupakan seorang suri rumah yang buta huruf. Terdapat, antara lain: (a) tiada alasan yang baik diberikan mengapa Nanang tidak dapat memberikan ubat itu sendiri; dan (b) tiada bukti yang boleh dipercayai bahawa ubat yang sama untuk asma atau jantung, tekanan darah tinggi dan kolesterol tidak terdapat di Indonesia. Walaupun Nanang tersebut wujud, pembelaan pembawa yang tidak bersalah hanya boleh memanfaatkan tertuduh sekiranya tiada sebab untuk syak wasangka diwujudkan, dan tiada hak dan peluang pemeriksaan, dan ketidaktahuan adalah tidak mencukupi untuk membantu pembelaan (lihat perenggan 83–84 & 86–88).

(4) Tertuduh berpeluang membuka bungkusan berkenaan bagi melihat isi kandungan ketika menaiki bas dari Lahad Datu ke Tawau yang mengambil masa kira-kira 150 minit. Tertuduh dengan sengaja tidak mengambil tahu kandungannya dan pembelaan pembawa yang tidak bersalah tersebut tidak berjaya (lihat perenggan 90–91)

(5) Pihak pendakwaan telah membuktikan kesnya terhadap tertuduh melampaui keraguan munasabah berkenaan semua elemen penting pertuduhan. Tertuduh mempunyai jagaan atau kawalan 312.98g methamphetamine dengan pengetahuan yang diperlukan (pemilikan sebenar) pada tarikh dan masa serta tempat yang dinyatakan dalam pertuduhan. Tertuduh gagal menyangkal anggapan statutori pengedaran atas imbangan kebarangkalian serta gagal menimbulkan keraguan munasabah dalam kes pendakwaan. Oleh itu, tertuduh disabitkan dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Mahkamah menjatuhkan hukuman penjara seumur hidup terhadap tertuduh, yang berusia 68 tahun ketika menjatuhkan hukuman, penjara seumur hidup dari tarikh dia ditangkap. Tertuduh walau bagaimanapun terlepas daripada hukuman sebat menurut s 289 Kanun Tatacara Jenayah (lihat perenggan 93–95).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995]3 CLJ 639, CA (refd)
Ariff Arhannan bin Che Udin v PP [2022] 3 MLJ 157; [2022] 4 CLJ 1, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chandru a/l Muniandy v Pendakwa Raya and another appeal [2020] MLJU 1647; [2021] 2 CLJ 48, CA (refd)
Dharma Danny Ferns v PP [2022] 1 LNS 229, HC (refd)
Dickson Levy a/l Maria George v PP [2018] MLJU 98, CA (refd)
Goh Han Heng v PP [2003] 4 SLR 374, HC (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Jorge Crespo Gomez v PP [2020] 5 MLJ 250; [2020] 8 CLJ 292, FC (refd)
Junaidi Berimang v PP and another appeal [2022] MLJU 452; [2022] 1 LNS 522, CA (refd)
Kanagasingam a/l Anantham v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 4 MLJ 103, CA (refd)
Koh Chin Wah v PP (Criminal Application No 07–13–11 of 2019 (W) (unreported) (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Low Song Kim v PP [2020] MLJU 73; [2020] 1 LNS 11, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Cawthamen a/l Mathevan and another case [2021] MLJU 813; [2021] 1 LNS 728, HC (refd)
PP v Entiran a/l Durasamy and other cases [2022] 8 MLJ 900; [2021] 10 CLJ 902, HC (refd)
PP v Galam bin Akang [2020] MLJU 2122, HC (refd)
PP v Hadi Bakhshi Kheimeisari Aliasghar and another appeal [2021] 3 MLJ 259, CA (refd)
PP v Hafizal Ismail [2019] 1 LNS 1038, HC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724; [2016] 1 LNS 1855, CA (refd)
PP v Lam San [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391, FC (refd)
PP v Mohamad Sofan bin Abasrah [2021] MLJU 1573; [2021] 1 LNS 1466, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Mohd Saifuddin bin Ab Rahman and another appeal [2021] 2 MLJ 629, CA (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
PP v Santanasamy a/l Muthiah & Ors [2020] MLJU 1208; [2020] 1 LNS 911, HC (refd)
PP v Taza bin Tarji & Anor [2018] 10 MLJ 430, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599, FC (refd)

Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Sahrul Mazlee bin Mohd Khalid v PP [2022] 3 MLJ 919; [2022] 1 LNS 4, CA (refd)
Taza bin Tarji v PP and another appeal [2020] MLJU 1822, CA (refd)
Taza bin Tarji v Pendakwa Raya (Criminal Appeal No 05(M)–99–09 of 2022(J)) (unreported), FC (folld)
Taza bin Tarji v PP and another appeal [2020] MLJU 1794; [2020] 1 LNS 1590, CA (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)
Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 1, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138,
Zaliman bin Zakaria v PP [2020] MLJU 1409; [2020] 1 LNS 1259, CA (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 26A
Criminal Justice Act 1953 s 3
Criminal Procedure Code ss 64, 182A(1), 289
Dangerous Drugs Act 1952 ss 37, 37(da)(vi), (da)(xvi), 39B(1), (1)(a), (2), B(2A), (2A)(a), (2A)(b), (2A)(c), (2A)(d), First Schedule
Evidence Act 1950 ss 45, 105, 114(g)
Security Offences (Special Measures) Act 2012 s 13, 13(2), First Schedule

Hurman Hussain ((Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Mohd Fadzlullah bin Zainal Abidin (Kang Advocates) for the accused.

Lim Hock Leng J:

THE CHARGE

[1] The accused, a woman of Indonesian nationality, was charged with the trafficking of methamphetamine in Tawau.

[2] The charge was framed in the following manner:

> That you, on the 28th day of February 2020, at about 2.40pm, located at Bilik Pemeriksaan Polis Bantuan, Tawau Ferry Terminal, in the District of Tawau, in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 312.98 grams of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act, 1952, and punishable under Section 39B(2) of the same Act.

A THE PROSECUTION'S NARRATIVE

[3] On 28 February 2020, at about 2.40pm, Constable Salina bt Sagul (PW3), a member of the auxiliary police force, was on duty at the Ferry Terminal Tawau. When PW3 was conducting a search on the accused, she noticed that the accused was in a state of anxiety.

[4] PW3 felt suspicious and ordered the accused to go with her to the search room at the ferry terminal. There, PW3 carried out a body search on the accused in the presence of her colleague Constable PB Noranisyah bt Amirudin.

[5] The accused was wearing a pair of brown pants, P10.

[6] PW3 discovered two black plastic packages, P11(a) and (b), in the front pocket of the accused's brown pants, P10. There were five black plastic packets in each of these two black plastic packages, P11(a) and P11(b).

[7] These ten black plastic packets were each wrapped in adhesive tape, and marked at the trial as P12(1–10). They contained smaller plastic packets — P6(SB1b)-(SB5b) and (SC1b)-(SC5b) — wrapped with white tissue paper — P13(1)–(10).

[8] P6(SB1b)-(SB5b) and (SC1b)-(SC5b) each contained white crystalline substances suspected to be methamphetamine.

[9] PW3 issued the *Borang Senarai Geledah* (P16) detailing the items discovered and seized. P16 was signed by PW3 and the accused. PW3 made markings on the case exhibits. She also wrote the date of seizure and signed on the case exhibits which she identified in court.

[10] Also, on the day of the arrest, PW3 lodged a police report (P15) on the arrest and seizure of the case exhibits. At 5.15pm that day, she handed over the case exhibits to Inspector Syed Muhammad Iqbal bin Syed Yassin, the Investigating Officer (PW4).

[11] The handing over was evidenced vide the *Borang Serah Terima Barang Kes* (P17) which was signed by both PW3 and PW4.

[12] PW3 also handed over to PW4 the accused, as well as P15 and P16.

[13] PW4 in his witness statement listed down the case exhibits which had been seized and handed over to him, including particularly the brown pants

P10 and the drugs concealed under various layers of wrappings and in plastic packets or packaging. See WSPW4, para 4. A

[14] PW4 made his markings on these case exhibits which he identified in court. B

[15] PW4 confirmed that he received P15 and P16 from PW3.

[16] He kept the case exhibits under lock and key in a steel cabinet about five minutes after they were handed over to him. He alone had the key to the steel cabinet. C

[17] On 29 February 2020, the day after the accused had been arrested, PW4 took out the case exhibits to be photographed. He gave evidence he took 32 photographs of the case exhibits, D1(1)–(32). He also gave evidence that, accompanied by PW3, he went to the Tawau Ferry Terminal at about 2pm, to take photographs of the place of incident/tempat kejadian, P14(1)–(6). D

[18] The same day, PW4 deposited all the case exhibits at the exhibit store with Corporal Kartini bt Selon (PW2) who confirmed these exhibits were received by her in good condition and made entries in the registration book (P8). E

[19] On 1 March 2020, at about 10pm, PW4 took out these case exhibits in an envelope on which he had made the marking 'SI 1' and which had the seal PDRM 545 (P5). That movement was documented in P8 and also in P9 which is a copy of the relevant page of the registration book. F

[20] The following morning, at about 10.32am, PW4 handed over the said sealed envelope with his marking 'SI 1' (P5) and the case exhibits inside, together with the request for chemical analysis (P4) to one Rita Tie Ung Ha (PW1), a chemist at Jabatan Kimia Malaysia Kota Kinabalu. A receipt bearing the date 2 March 2020 and the time 10.32am was issued and signed by PW1. The receipt (P3) was also signed by PW4 as the person who handed over the envelope. G H

THE DUTY OF THE COURT AT THE CLOSE OF THE PROSECUTION'S CASE

[21] The decisions of the apex court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 require a trial judge, at the end of the prosecution's case, to subject the evidence to maximum evaluation to determine whether there is a prima facie case against the accused which requires I

A him to enter his defence. A prima facie case is established where the prosecution has adduced such evidence of the essential elements of the charge as are sufficient to convict the accused, if he were to keep silent and the evidence is left unexplained or unrebutted.

B ESSENTIAL ELEMENTS OF THE CHARGE

[22] To make out its case against the accused, the prosecution had to establish: (i) the identity and weight of the drugs, viz, 312.98g of methamphetamine; (ii) the accused had possession of the drugs; and (iii) the C accused was trafficking the drugs on the date, and at the time and place as particularised in the charge.

(i) Identity and weight of the drugs

D

[23] To prove the identity and weight of the drugs seized, the prosecution called PW1 whose academic credentials include a Bachelor's, and Master's degree in Science (Forensic Science) from the University of Science Malaysia. PW1 has been in the service of Jabatan Kimia Malaysia since 18 July 2005.

E

[24] She has attended various courses, seminars, conferences and workshops on the analysis of dangerous drugs and related subjects, and testified on more than 200 occasions in court without any adverse comments.

F **[25]** She confirmed PW4's testimony in respect of the handing over and receipt of the envelope marked 'SI 1'and wax-sealed 'PDRM 545' in good condition for which she had issued a receipt, as well as the request for chemical analysis. She then affixed and signed on a laboratory sticker bearing the unique laboratory number 20-FR-S-01123 on the envelope 'SI 1.'

G

[26] Only PW1 had the key to the metal cabinet inside the storage room in the laboratory, where the drug exhibits were kept. She kept the drug exhibits under lock and key when she was not analysing the crystalline substances.

H

[27] PW1 carried out the Marquis and Simon's tests as well as the GC-MS and GC-FID tests. She ascertained that there was a nett weight of 312.98g of methamphetamine in the crystalline substances which had a gross weight of 440.82g.

I

[28] PW1 prepared the Chemist Report dated 3 June 2020, with the reference 20-FR-S-01123 which set out her findings. She identified the drug exhibits which she had received from PW4 in the course of giving evidence. She also identified her Chemist Report and it was marked as P7 at the trial.

[29] After analysis, the balance of the crystalline substances was sealed in a plastic packet (P6) with the laboratory number 20-FR-S-01123 and placed inside the envelope P5.

[30] In line with PW4's testimony, PW1 confirmed that she handed over P5 together with P7 to PW4 on 10 June 2020, at about 9am. PW4 then put P5 and P7 in the steel cabinet, and only he had the key to it.

[31] On 12 June 2020, at about 10am, PW4 deposited P5 in the exhibit store at IPD Tawau through PW2 who confirmed the safekeeping which is further corroborated by P8 and P9.

[32] The accused did not challenge PW1's academic credentials and expertise, as well as her findings on the identity and weight of the drugs. There was no cross-examination of PW1 and as her evidence was not inherently incredible, her findings in P7 on the identity and weight of the drugs were accepted as true. See *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, *Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391 and *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138.

[33] PW1's evidence was accepted as expert evidence under s 45 of the Evidence Act 1950.

[34] There was no break in the chain of evidence concerning the drugs which would cast reasonable doubt on their identity and weight. The drugs that were seized were the drugs which were produced and identified in court.

(ii) Possession

[35] In order to prove possession, the prosecution had 'to establish that: (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA. See *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576.

[36] The prosecution, relying on *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, contended that the accused had custody and control of the drugs because the two black plastic bags, P11(a)-(b), containing the drugs under various layers, were found in the front pocket of P10 which the accused was wearing at the time of arrest.

[37] The accused's case put across to PW3 during cross-examination was that the two black plastic bags, P11(a)-(b), containing the drugs, were found in a bag which was not produced at trial, in respect of which an adverse inference ought to be drawn pursuant to s 114(g) of the Evidence Act. It was argued that there was an 'act of willful (sic) failure to record the existence of this evidence (the bag) and then not handing it over to (PW4)' who had confirmed that no bag was handed over to him — see NOP, Q&A 176.

[38] PW3 was certain that the drugs were found in the front pocket of the brown pants which the accused was wearing when she was searched at the Tawau Ferry Terminal. PW3's testimony is sufficiently compelling to make out the prosecution's case of actual possession, such that the accused has to provide rebuttal evidence or an explanation.

[39] PW3 and the accused did not know each other before their encounter on 28 February 2020, and there is no discernible reason or motive why PW3 would frame the accused. See *Sahrul Mazlee bin Mohd Khalid v Public Prosecutor* [2022] 3 MLJ 919; [2022] 1 LNS 4.

[40] I would also refer to *Dickson Levy a/l Maria George v Public Prosecutor* [2018] MLJU 98 where the Court of Appeal, in citing *Goh Han Heng v Public Prosecutor* [2003] 4 SLR 374 with approval, held:

> I disagreed (sic) with counsel. All that the passage means is that where the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall on the prosecution to disprove that motive. This does not mean that the accused merely needs to allege that the complainant has a motive to falsely implicate him. Instead, the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive. To hold otherwise would mean that the prosecution would have the burden of proving a lack of motive to falsely implicate the accused in literally every case, thereby practically instilling a lack of such a motive as a constituent element of every offence.

[41] Neither would I think that PW3 could be mistaken, bearing in mind that the *Borang Senarai Geledah* (P16) and *Borang Serah Terima* (P17) were signed off by her at Pejabat Narkotik Tawau on the same day the accused was arrested. They can validly be treated as contemporaneous records which corroborate her evidence that the drugs were recovered from the accused's person, not the bag.

[42] PW3 had filled up both forms. The accused signed on P16 which states: 'pemeriksaan tubuh badan/di bahagian perlepasan penumpang terminal Feri Tawau' and records the search as having taken place on 28 February 2020. The

drugs in all the layers and packaging were described as having been found 'di dalam poket seluar hadapan berzip warna coklat yang di pakai oleh perempuan tersebut' by PW3'.

[43] There is no reason for PW3 to testify that the drugs were found in P10 if indeed they were discovered in the bag. Assuming the existence of the bag, it was not a seized item and was thus not required under s 64 of the Criminal Procedure Code to be recorded in P16 and P17.

[44] An item is not required to be seized where there is no nexus between the drugs and the item. A recent decision of the Court of Appeal underscores the point. In *Low Song Kim v Public Prosecutor* [2020] MLJU 73; [2020] 1 LNS 11, there was a green bag on the floor next to the table where the drugs were found but that bag was not seized. The prosecution submitted that the bag was not material evidence for the charge.

[45] Rhodzariah Bujang JCA (as Her Ladyship then was) agreed and held:

> With respect, we do not see any merit in this issue raised for we agree with the learned DPP that the green bag or box had nothing to do with the drugs which were on the table because as testified by PW13, for they were just receptacles used to place 23 the drug exhibits, and to carry them after their seizures. As shown in the photographs exh P108(4), (5) and (6) there were lots of other things found near and around the sitting room table and unless they were connected in one way or another with the drugs seized, it is pure common sense, not just the law, that the prosecution need not have to tender them in court. The relevancy of the evidence, in other words is the paramount consideration.

[46] Additionally, PW3 had lodged a police report (P15) at 1649hrs, shortly after the accused was examined and arrested. In P15, PW3 stated: 'Pemeriksaan tubuh badan yang dijalankan ke atas perempuan itu saya telah menjumpai dua bungkusan plastik berwama hitam di dalam poket seluar hadapan berzip wama coklat yang dipakai oleh perempuan tersebut ...'.

[47] Taking stock of P15, P16 and P17, I do not doubt PW3's testimony that the drugs were found in P10. They were not found in the bag.

[48] I do not think there is any merit in the accused's contention that the two black plastic packages, P11(a) and (b), could not fit into the front pocket of P10 — see accused's submission, encl 34, para 4(a) and (b) — or that alternatively, if those packages were to be forcibly stuffed into P10, there would be a conspicuous distortion which would attract attention such that it is unlikely the accused would have attempted to hide the drugs in that manner.

[49] However, there were no measurements of the two black packages and the front pocket of the brown pants provided by the defence to lend credence to its submission that it was an impossible fit or that, if the black packages were forcibly inserted, the bulge would be so conspicuous and suspicious it would defy logic to attempt such a form of concealment.

[50] In any event, the portly accused was attired in loose outer top garments and a large outer skirt which completely concealed the brown pants she was wearing underneath, as may be observed from the second photograph vide D2(1)–(2).

[51] It was not at any point disputed that she was wearing P10 at the time she was arrested.

[52] Knowledge, as a requisite element of possession, may be inferred from the intricate manner in which the drugs were concealed in P10 which the accused was wearing under the loose garments when searched and arrested. See *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717.

[53] The cross-examination of PW3 and PW4 alluded to the defence of innocent carrier. It was put to PW3 that the accused informed her that she thought the packages contained medication for asthma (*ubat ampus*). It was put to PW4 that the accused informed him that she did not know that the packages contained drugs, and that a family member by the name of Nanang in Lahad Datu had asked her to bring medication for Nanang's family in Indonesia.

[54] If anything, the nature of the defence requires the accused to give evidence for those are matters within her knowledge. The cross-examination questions on their own would not support the contention of the defence that a prima facie case has not been made out.

(iii) Trafficking

[55] In *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599, the Federal Court held that once there is a finding of actual possession of the drugs meeting the threshold quantity, 'the statutory presumption of trafficking under s 37(da)(vi) must come into play'. See also the decision of the Federal Court in *Ariff Arhannan bin Che Udin v Public Prosecutor* [2022] 3 MLJ 157; [2022] 4 CLJ 1, paras 13–5.

[56] Since the evidence was sufficient to prove actual possession so as to trigger the presumption of trafficking under s 37(da)(xvi) of the Dangerous Drugs Act 1952, it was for the accused to rebut the presumption of trafficking

on a balance of probabilities. See s 105 of the Evidence Act 1950 and *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116.

THE DEFENCE

[57] The evidence at the close of prosecution's case was sufficient for a conviction to be recorded against the accused in respect of the charge if left unrebutted or if it was not overthrown by rebuttal evidence. I therefore called for the accused to enter her defence.

[58] The accused elected to give evidence on oath as the sole witness for her defence.

[59] The accused testified that she came to Tawau by sea, the day before she was arrested, at the request of Nanang to collect 'ubat jantung, darah tinggi dan kolestrol' to be brought back to Indonesia for Nanang's grandmother and uncle. She testified that Nanang's grandmother is her aunt.

[60] After arriving in Tawau, following a meal and prayers, the accused took a taxi to a bus station so that she could catch a bus to Lahad Datu to meet up with Nanang who lived in a kampung there. She said she had small bags (*beg-beg kecil*) containing personal items with her, although she was later to refer to only one bag.

[61] When shown P10, the accused admitted she was wearing the brown pants when she arrived. See NOP, Q&A 223.

[62] She explained the purpose of the front pocket thus: 'Memang begitu orang Bugis biasa pakai untuk menyimpan apa-apa barang yang orang tidak boleh nampak'. She went on to elaborate:

> Biasanya sisa duit tambang kerana takut biasa ada pencuri di atas kapal. See NOP, Q&A 224–225.

[63] The accused alighted from the bus at the night market in Lahad Datu, some time after 5pm. Nanang — who was described as 'gemuk-gemuk dan pendek' — met her at the mosque and took her home. At the house, the accused was asked to bring the medication back to Indonesia the following day.

[64] At 7am, Nanang took the accused by car to the Lahad Datu bus station where the accused was to take the bus to Tawau.

[65] In the car, Nanang gave her the packages. According to the accused, 'terus saya masukkan ke dalam beg kecil bersama pakaian saya'. See NOP, Q&A

236. She described the black bungkusan as big as a fist ('besar bungkusan itu seperti satu genggaman tangan'), and showed her clenched fist to indicate the size of the black package. Upon her counsel showing his clenched fist, she said: 'Kecil lagi daripada ini'. See NOP, Q&A 237–239.

[66] The accused repeatedly stated that the black packages ('saya ingat macam ada enam plastik' — NOP, Q&A 243) would not fit into the front pocket of P10, and explained that those packages were put into a small bag '(k)erana bungkusan itu lebih besar daripada poket seluar saya'. See NOP, Q&A 257–260. When shown P10 and P6(a) and told the gross weight of the drug exhibits was 455.23g, the accused reiterated that the drug exhibits would not fit the front pocket of P10. See NOP, Q&A 261.

[67] According to the accused, she was in the queue to have her passport stamped when she was frisked and questioned 'apa ini makcik?' to which she replied: 'tidak tahu itu hanya ubat yang si Nanang kirim untuk bagi kepada pakcik saya'.

[68] She averred that the police opened the bag but she did not know if the police personnel who opened the bag and 'terhambur itu barang' came to court to give evidence. See NOP, Q&A 250–255. She denied that she knew of the drugs as the package was sent by Nanang to her family. At the police station, she said that the package was to be sent to Nanang's grandmother. See NOP, Q&A 265 and 269.

[69] Lastly, in her examination-in-chief, the accused said 'saya tidak pandai tandatangan dan tidak pandai membaca' as she had only gone to a religious school to learn the recitation of prayers. She denied having signed any document. See NOP, Q&A 271–273.

EVALUATION OF THE DEFENCE

[70] The main thrust of the defence is that the drugs were found in the accused's bag and not in the front pocket of the brown pants she was wearing when searched, and that she is an innocent carrier.

[71] It will be recalled that the defence had contended that it was a physical impossibility for the drugs to fit the front pocket (given that they were about the size of the top of the digital weighing scale at bthe police station) or, alternatively, if they could be forcibly inserted, the accused would not have done so since that would attract unwanted attention. The alternatives or the defence's uncertainty underpin the prosecution's submission that these are mere suggestions since there was no evidence of 'the measurements, the physics

and dimensions of the items involved'. In consequence, no reasonable doubt was cast on PW3's testimony as to where the drugs were found.

[72] In any case, even from a visual examination of P10 and the packages, aided by the accused's testimony that the packages were the size of her clenched fist, it can be seen that they would fit into the front pocket of P10. In fact, it was more of a pouch.

[73] Under cross-examination, the accused acknowledged that the pocket was not originally part of P10 but was subsequently added. See NOP, Q&A 284. It seems unlikely that the pocket was stitched on 'sebab selalu banyak pencuri di atas kapal' because she was worried her money — which was the only item in the pocket — could be stolen. See NOP, Q&A 286. That worry is inconsistent with her earlier testimony that she put her money in her bag. See NOP, Q&A 220–221. I would think that the pocket was added to accommodate the drugs, more so as outer garments were worn over the brown pants, thus providing total concealment.

[74] To reiterate, the contemporaneous documents P15, P16, and P17 show that PW3 had, shortly after the discovery of the drugs, recorded where the drugs were found. The contemporaneous documentation thus safeguarded against the frailties of memory and mistaken testimony.

[75] Since there is no evidence of any animosity or relationship between the accused and the prosecution's witnesses PW3 and PW4, it cannot realistically be said that the accused was framed.

[76] It was submitted for the accused that police personnel might have a motive to frame the accused to lighten their workload in cases of 'presumed possession'. It is difficult to see the point made. The submission is also unmeritorious since the prosecution's case is that of actual possession and this court, following the decision of the Federal Court in *Jorge Crespo Gomez v Public Prosecutor* [2020] 5 MLJ 250; [2020] 8 CLJ 292, had called for the defence on the basis of actual possession.

[77] Further, the alleged motive is no more than a submission from the bar and it was not put to PW3 and PW4, thus unfairly depriving them of the opportunity to rebut the allegation of such a motive.

[78] On a related note, but no less significant, although the accused denied signing any document, it was not put to PW3 that the accused had not signed the *Borang Senarai Geledah* (P16) wherein it was stated that the drugs in the black plastic packaging were found in P10 which the accused was wearing at the material time.

[79] In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639, Gopal Sri Ram JCA expressed in no uncertain terms that: It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination.

[80] Hearkening to that principle, Azizul J, in *Dharma Danny Ferns v Public Prosecutor* [2022] 1 LNS 229, elaborated: '… a defence counsel would have to have in mind the defence that he proposes to raise for his client, and where appropriate, pose the necessary questions to the material witnesses of the prosecution in order to lay the foundation for his client's defence. This remains the case even if the prosecution has not closed its case and the court has not yet pronounced whether a prima facie case has been made out'.

[81] To rebut knowledge, it was submitted that the accused did not try to flee. The submission is without basis, considering that the accused was 65 years of age and of portly appearance at the time she was arrested. There is also the presence of PW3 and Constable PB Noranisyah bt Amirudin, not to mention other passengers, which would have limited any real opportunity to escape.

[82] On that note, I would refer to what James Foong FCJ had to say in delivering the unanimous decision of the Federal Court in *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741 at p 745:

> It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried.

[83] As for the defence of innocent carrier, I am of the view that Nanang does not exist. Apart from describing Nanang as 'gemuk-gemuk dan pendek' and that she resides in Kampung Bugis in Lahad Datu, the accused did not provide any material particulars of Nanang such as Nanang's telephone number (although both of them had communicated over the phone). While a kampung may not have numbered houses, the accused did not specify or describe the house in which Nanang resided. Neither did the accused describe the car in which she was taken by Nanang to the bus station in Lahad Datu. There was no tangible or credible evidence such as a photograph that Nanang exists.

[84] It is incredulous that the accused would agree to make the journey from Indonesia to Tawau and thence Lahad Datu solely to collect medication to be delivered to Nanang's grandmother and her uncle, especially since the accused,

an illiterate housewife, had only been to Malaysia with her aunt once and that was a long time ago when the country was a jungle. See NOP, Q&A 205.

[85] All the more so when the accused had testified: 'Tidak ada orang yang berani pergi ke sini dan tidak tahu kampung di sini'. See NOP, Q&A 212.

[86] There was no good reason given why Nanang could not deliver the medication herself.

[87] There was no credible evidence that the same medication for asthma (as put across to PW3) or for the heart, high blood pressure and cholesterol (as asserted by the accused) was not available in Indonesia. It is not known if the drugs were to be delivered to Nanang's grandmother and/or uncle. There was no explanation which medication was to be given to Nanang's grandmother or uncle and for which ailment.

[88] Even if Nanang exists, the defence of innocent carrier can only avail the accused if there is no reason for suspicion, and no right and opportunity of examination, and ignorance simpliciter is not enough. See *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240.

[89] Assuming Nanang exists and the accused and her are related, surely the accused would have felt suspicious when the medication wrapped in black plastic packaging was not given to her in the evening but only early the next morning when Nanang sent her to the bus station.

[90] The accused had the opportunity to open the packages to look at the contents while on the bus from Lahad Datu to Tawau, a journey which takes about 150 minutes — going by the accused's testimony vide NOP, Q&A 227. I am thus unable to agree with learned counsel for the accused that the accused did not have the opportunity to do so.

[91] At best, the accused was wilfully blind to the contents and the defence of innocent carrier does not avail her. As held by the Federal Court in *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724; [2016] 1 LNS 1855:

> Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations.

A CONCLUSION

[92] At the conclusion of the trial, the duty of the court is to consider all the trial evidence and decide whether the prosecution has proved its case beyond reasonable doubt: s 182A(1) of the Criminal Procedure Code.

B

[93] Considering the evidence in its totality, I find that the prosecution has proven its case against the accused beyond reasonable doubt in respect of all the essential elements of the charge. That is to say, the accused had custody or control of 312.98g of methamphetamine with the requisite knowledge (actual possession) on the date and at the time and place stated in the charge.

C

[94] The accused failed to rebut the statutory presumption of trafficking on a balance of probabilities, and to raise a reasonable doubt in the prosecution's case in other material respects.

D

[95] The accused is accordingly convicted of the offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 with which she was charged.

E

[96] Before passing sentence, the court sought the views of the prosecution and defence on s 39B(2A) of the Dangerous Drugs Act 1952, in the wake of the decision of the Federal Court in *Taza bin Tarji v Pendakwa Raya* (Criminal Appeal No 05(M)–99–09 of 2022(J)) (unreported) on 15 February 2022, affirming the finding of the minority in *Taza bin Tarji v Public Prosecutor and another appeal* [2020] MLJU 1794; [2020] 1 LNS 1590 that limbs (a), (b), (c) and (d) of the said section are to be read disjunctively when a court deliberates whether to exercise its discretion to impose a sentence of life imprisonment and a minimum of 15 strokes of whipping, in lieu of the death sentence.

F

G

[97] The court also enquired of the parties whether they would want to call evidence, apart from submitting on the circumstances in which it may exercise its discretion on the punishment to be meted out. The parties indicated that they would not adduce evidence for the sentencing, and would confine themselves to oral submissions.

H

[98] To begin with, s 39B(1) prohibits, inter alia, the trafficking of dangerous drugs which are listed in the First Schedule of the Dangerous Drugs Act 1952, including methamphetamine.

I

[99] Section 39B(2) goes on to state that a person who is guilty of contravening any of the provisions of s 39B(1) 'shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes'.

[100] The court's discretion in meting out either the death sentence or life imprisonment with 15 strokes of whipping turns on the interpretation of s 39B(2A). It provides that 'in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, the court may have regard only to the following circumstances:

(a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;

(b) there was no involvement of agent provocateur; or

(c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and

(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[101] Both s 39B(2) and s 39B(2A) came into force on 15 March 2018.

[102] As it stands, it appears there are four ways in which s 39B(2A) has been interpreted.

[103] First, the Court of Appeal in *Zaliman bin Zakaria v Public Prosecutor* [2020] MLJU 1409; [2020] 1 LNS 1259 and *Public Prosecutor v Mohd Saifuddin bin Ab Rahman and another appeal* [2021] 2 MLJ 629 took the position that in order for the discretion to be exercised as to whether a person convicted under s 39(B)(1) is to be spared the death sentence under s 39B(2A), he must have satisfied one of the conditions listed in (a), (b) or (c) as well as (d). See also the majority judgment of the Court of Appeal in *Taza bin Tarji v Public Prosecutor and another appeal* [2020] MLJU 1794; [2020] 1 LNS 1590. A number of trial courts took the same position and among some of the cases are *Public Prosecutor v Taza bin Tarji & Anor* [2018] 10 MLJ 430, *Public Prosecutor v Hafizal Ismail* [2019] 1 LNS 1038, *Public Prosecutor v Santanasamy a/l Muthiah & Ors* [2020] MLJU 1208; [2020] 1 LNS 911, *Public Prosecutor v Cawthamen a/l Mathevan and another case* [2021] MLJU 813; [2021] 1 LNS 728, *Public Prosecutor v Mohamad Sofan bin Abasrah* [2021] MLJU 1573; [2021] 1 LNS 1466 and *Public Prosecutor v Galam bin Akang* [2020] MLJU 2122.

[104] Second, in *Public Prosecutor v Hadi Bakhshi Kheimeisari Aliasghar and another appeal* [2021] 3 MLJ 259, Abu Bakar Jais JCA, in delivering the judgment of the Court of Appeal, held that 'both (c) and (d) of the provision above must be satisfied because of the word 'and' between (c) and (d). It must be read as conjunctive and not disjunctive. Thus, it is not sufficient for the trial judge to find the appellant was a mere transporter of the drugs. It must also be proven that the appellant had assisted an enforcement agency in disrupting

drug trafficking activities within or outside Malaysia'.

[105] Third, in *Junaidi Berimang v Public Prosecutor and another appeal* [2022] MLJU 452; [2022] 1 LNS 522, Ravinthran Paramaguru JCA, speaking for the majority, held that 'in order to invoke sub-s (2A), an accused must compulsorily satisfy limbs (a) and (d) and must also satisfy either limb (b) or (c)'. In *Chandru a/l Muniandy v Pendakwa Raya and another appeal* [2020] MLJU 1647; [2021] 2 CLJ 48, the Court of Appeal, with His Lordship delivering the judgment, had arrived at the same conclusion.

[106] In short, there are three conflicting decisions in the Court of Appeal on how s 39B(2A) is to be construed.

[107] Fourth, the Federal Court had on 15 February 2022, affirmed the decision of Lee Swee Seng JCA who wrote the minority judgment in *Taza bin Tarji v Public Prosecutor and another appeal* [2020] MLJU 1822.

[108] The reasoning of the minority judgment there was later echoed in *Junaidi Berimang v Public Prosecutor and another appeal* [2022] MLJU 452; [2022] 1 LNS 522 where His Lordship, who was also in the minority in the Court of Appeal, was of the view:

> The use of the word 'and' before circumstance (d) is because it is the last item in the list of circumstances to be considered and it makes no difference if the word 'or' had been used because the court is entitled to consider the circumstances spelt out in (a) to (d) if there are present. If at all the word 'and' before circumstance (d) would mean that if that circumstance is present, then it is not to be ignored or disregarded but the court may have regard to it when it comes to the court exercising its discretionary powers whether to impose the lesser sentence.

[109] The prosecution pointed out that the grounds and reasoning of the Federal Court had yet to be made available and contended that the decision ought not to be taken as binding.

[110] Taking the point further, it seems the contention is that this court ought to be bound by any one of the three conflicting Court of Appeal decisions, all of which require the presence or fulfilment of limb (d). That is to say, there has to be affirmative evidence that the accused had rendered assistance to an enforcement agency in the disruption of drug trafficking activities before the court can exercise its discretion as to the form of punishment. Since there was no such evidence, the conclusion was that the court had no discretion as to the form of sentencing, and the death sentence would be mandatory.

[111] The prosecution relied on *Kanagasingam a/l Anantham v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 4 MLJ 103 where the Court of

Appeal held:

> The appellant did not produce the written grounds from the Federal Court. Although the appellant produced the order of the Federal Court dated 16 August 2018, and tried to convince us that there was only one issue raised, ie delay under s 5 of the SPM Act, it was our view that without the written grounds, we would not be able to know whether the appeal was dismissed on the said issue raised. We cannot speculate whether the decision was based on delay issue or it could be based on some other reasons. We cannot agree with the appellant that we are bound by the decision of the Federal Court in *Abdul Wahid*'s case.

[112] The prosecution also relied on *Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1 where the Federal Court held:

> The respondents argued that the Federal Court there had heard a similar argument on this point and refused the detainee a writ of habeas corpus. As at the date of our decision in this appeal, no written grounds had been delivered in respect of that case and so we were therefore unable to glean any reasons why such a decision was made. Therefore, we did not see how the said judgment lent any support to the respondents' case. Surely, in arriving at our decision, we had to consider and apply the law according to the facts and circumstances of this case.

[113] Nonetheless, on a reading of the authorities cited by the learned DPP, the principle is not unqualified. It is not meant to be applied in every instance.

[114] In *Public Prosecutor v Entiran a/l Durasamy and other cases* [2022] 8 MLJ 900; [2021] 10 CLJ 902, the prosecution conceded that the Federal Court had, in *Koh Chin Wah v Public Prosecutor* (Criminal Application No 07–13–11 of 2019 (W) (unreported), granted bail to a man charged for carrying out smuggling of migrants under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. But it argued that the decision of the Federal Court was not binding because no grounds had been provided.

[115] However, Justice Su Tiang Joo did not consider himself shackled by *Kanagasingam* and *Vishnu* and held that 'although no grounds of judgment were given by the Federal Court in *Koh Chin Wah v Public Prosecutor*, this court ought not to cover its ears to the undisputed fact that our apex court, the Federal Court, had granted bail to a male applicant who was charged with a security offence listed under the First Schedule of the SOSMA and by reason of which s 13 of the SOSMA would apply. It can be safely inferred from this decision of the Federal Court that the court has the jurisdiction and power to grant bail to a male person charged with a security offence listed under the First Schedule of the SOSMA although he may not be in the categories of persons amenable to bail under s 13(2) of the SOSMA'. His Lordship drew on *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, where the Federal Court stated that 'if the prosecution's evidence admits of two

or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused,' and reasoned:

> By a similar analogy where a decision of the Federal Court admits of two or more inferences, one of which is in favour of the accused, then it is the duty of this court to draw an inference that favours the accused, especially when a decision on bail may not be amenable to appeal ...

[116] From that perspective, it is even more compelling for the decision of the Federal Court in *Taza* to be considered binding, for no other inferences may be drawn from it.

[117] Although the decision of a higher court without grounds is generally considered not binding because the issues or facts in a case in the court below may be materially different, the decision of the Federal Court in *Taza* is premised on a pure question of law resting on the interpretation of s 39B(2A), with no other factual possibility or permutation since the conviction was affirmed.

[118] The minutes of the panel chaired by Tengku Maimun CJ show that the apex court's decision does not admit of any other possibility, since the Federal Court made express reference to and affirmed the minority judgment of Lee Swee Seng JCA whereby His Lordship held that a court may exercise discretion in imposing punishment when any one of the four circumstances is present.

[119] As such, this court would consider the decision of the Federal Court in *Taza* as binding.

[120] The minutes, a copy of which was obtained from the Federal Court Registry and extended to the prosecution and the defence for purposes of submissions, are also set out in the minority judgment in *Junaidi*. They are reproduced as follows:

> This is our unanimous decision. On failure to proof (sic) particulars of the charge and issue of possession we find no merits in the ground raised. On the totality of the evidence we find that the conviction is safe. On sentencing we agree with the minority judgment. We hereby affirmed the finding of the minority that upon a plain reading para (a)-(d) of s 39B(2A) should be read disjunctively.
>
> The appeal is therefore allowed on the sentence. The sentence of life imprisonment for both the appellant from the date of arrest and 15 strokes of whipping is affirmed in accordance with s 39B(2A) of the DDA.

[121] In the instant case, there is no evidence of buying or selling of the drugs at the time the accused was arrested.

[122] Having regard to limb (a) and after hearing submissions, the court exercised its discretion pursuant to s 39B(2A) of the Dangerous Drugs Act 1952. The court sentenced the accused — who was 68 years of age at the time of sentencing — to life imprisonment from the date of her arrest (28 February 2020) which, under s 3 of the Criminal Justice Act 1953, is to be treated as a sentence of imprisonment for 30 years. The accused is spared the punishment of whipping on account of s 289 of the Criminal Procedure Code which provides that females shall not be punishable with whipping.

Accused was sentenced to life imprisonment with no whipping.

Reported by K Selvaraju